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I. Prologue

"The bureaucracy has consistently thwarted the will of Congress by drafting regulations that go far beyond congressional intent."[1] The charge that executive branch agencies have run amuck in exercising their discretionary powers, as they implement congressional initiatives, provides a major source of tension within the federal government and feeds a growing national concern over the role of regulation in modern American society.[2] In suggesting a wide range of reforms, commentators have generally focused upon the two sources of administrative power, the agency and Congress, to elucidate techniques for restraining agency discretion.

First, the major reexamination of the role and legitimacy of the independent regulatory agencies—the fourth branch of government—results from a loss of faith in the independent expert, who initially provided the reason to develop independent agencies. "Un-

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1. 125 CONG. REC. S. 12150 (daily ed. Sept. 7, 1979) (statement of Senator Domenici).

2. AMERICAN ENTERPRISE INSTITUTE, MAJOR REGULATORY INITIATIVE DURING 1980—THE AGENCIES, THE COURTS, THE CONGRESS (1981).

less we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty."[3] The nature of the independent expert, as a combiner of the legislative, executive, and judicial functions of government, has subjected independent regulatory agencies to close scrutiny in the expectation that a better understanding of their decision-making process and regulatory impact would suggest new solutions to the problem of restraining executive power.[4] This examination has yielded few results other than a strong reluctance in the legislative and executive branches to create new independent regulatory agencies or to give the existing agencies additional authority.[5] The negative attitude of the legislative and executive branches toward independent regulatory agencies suggests that further focus on the actions taken by agencies will not aid the goal of controlling the growth of administrative discretion. By rejecting the creation of new independent agencies in favor of establishing executive agencies responsible to the President, Congress has not cured any of the problems identified with the independent agency. Similar goals, functions, and procedures apply to all regulatory agencies regardless of "independence" and have at their base wide uses of discretion.

The second focus of the examination of agency discretion has been upon congressional delegation of power to the executive branch. After a flurry of judicial attention some forty years ago,[6] courts have since paid little attention to the delegation question. A number of cases have questioned whether Congress unconstitutionally delegated an overly broad grant of power to the executive branch in a series of regulatory statutes. The clear trend in these cases favors broad delegation.[7] Recently, however, commentators, including a number of members of the judiciary,[8] have suggested that stricter application of constitutional precepts could force Congress to provide more precise standards for the exercise of delegated authority, imposing a limit on executive abuse.[9]

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3. New York v. United States, 342 U.S. 882, 884 (1951) (Douglas, J., dissenting).

4. Friendly, *The Federal Administrative Agencies - The Need for Better Definition of Standards,* 76 HARV. L. REV. 858 (1962).

5. *See* AMERICAN ENTERPRISE INSTITUTE, MAJOR REGULATORY INITIATIVES DURING 1980—THE AGENCIES, THE COURTS, THE CONGRESS (1981).

6. A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

7. *See, e.g.,* Jakus v. United States, 321 U.S. 414 (1944). *See also* 1 B. MEZINE, J. STEIN & J. GUIFF, ADMINISTRATIVE LAW § 3.03(4) (1982).

8. McGowan, *Congress, Courts and Control of Delegated Power,* 77 COLUM. L. REV. 1119 (1979); Wright, *Beyond Discretionary Justice,* 81 YALE L.J. 575 (1972).

9. When Congress is too divided or uncertain to articulate policy, it is no doubt easier to pass an organic statute with some vague language about the 'public interest' which tells the agency, in effect, to get the job done. . . . An argument for letting the

Criticism of overly broad delegations of legislative authority is not confined to the academic and judicial worlds. Several congressmen have added their voices to those suggesting that the problem of unrestrained agency discretion can be controlled through more precise legislative direction.[10] Unfortunately, difficult issues usually provide the catalyst for broad delegation of authority. Creating an independent agency allows Congress to pass the buck to others[11] and appease constituents through affirmative action in passing legislation. Also, when the rules and regulations promulgated by the agency become oppressive, congressmen can stand back and charge that the agency has distorted the intention of Congress.[12]

The increased mandatory requirements and detail that characterize current legislation in the regulatory field indicate a renewed attention to the delegation question.[13] This trend stands in marked contrast to earlier legislation, in which the usual congressional definition of regulatory purpose was "to promote the public interest," with the "details left to the administrative agencies to work out."[14]

The Surface Mining Reclamation and Control Act of 1977[15] (SMCRA) is a contemporary example of congressional activity that produced an enormously detailed legislative product. The Act imposed highly restrictive standards on the coal mining industry, and also provided mandatory and detailed instructions to the responsible federal agency and to the states regarding implementation of the statute.

Complex and difficult issues arise in the regulation of coal mining, particularly pursuant to a state-federal partnership, and various interest groups fought an arduous battle to enact the Surface Mining Act. The resultant statutory example of detailed delegation, however, does not support the proposition that such constrained delegation satisfactorily directs the exercise of executive power. While evaluating the assumption that delegations of authority to an agency should be specifically stated, this article also examines the proposition that regulatory agencies inevitably go beyond the boundaries of

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experts decide when the people's representatives are uncertain or cannot agree is an argument for paternalism and against democracy.

Wright, *supra* note 8, at 584-85. *See also* Ackerman & Hassler, *Beyond the New Deal: Coal and the Clean Air Act,* 89 YALE L.J. 1466 (1980).

10. *See generally* McGowan, *supra* note 8.

11. 112 CONG. REC. H. 20,685 (daily ed. Sept. 21, 1976), *reprinted in* McGowan, *supra* note 8, at 1129 n.39.

12. 122 CONG. REC. H. 10,673 (daily ed. Sept. 21, 1976) (remarks by Rep. Flowers), *reprinted in* McGowan, *supra* note 8, at 1130 n.42.

13. *See* Resources Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987; Clean Air Act, 42 U.S.C. §§ 7481-7642 (1976 & Supp. III 1979).

14. Wright, *supra* note 8, at 585.

15. 30 U.S.C. §§ 1201-1328 (Supp. III 1979).

their enabling authority and create additional and unnecessary woes for the regulated industries and the American public.

II. The Statutory Scheme of SMCRA

Detailed statements of congressional intention, astounding complexity, and significant rigidity characterize the SMCRA. The legislative history supports the contention that problems in defining the delegation of congressional authority to both federal and state agencies and the difficulty of promulgating technical methods of controlling the adverse impacts from mining coal caused the complex and detailed nature of this statute.[16] While Congress clearly desired to adopt detailed performance standards in order to redress past abuses of coal mining, it also wished to provide federal and state agencies with precise instructions to insure implementation and enforcement of those standards. The Act's complexity also derived from repeated congressional attention given some issues over the course of seven years; seven years of congressional attention produced legislative language approaching the style of talmudic scholarship.

The SMCRA achieves the regulatory purpose of controlling the adverse effects of stripping coal through its design for federal-state relations. Concern that congressional directives had been ignored emanated from the apparent failure of the Department of Interior to successfully implement the congressionally mandated state-federal relationship.[17] Each of the major substantive issues that the drafters faced and subsequently resolved, such as the design of the enforcement program or the detailed performance standards, had an impact on the proposed legislative fit between the federal and state governments. In reality, the difficulty encountered in implementing the state-federal relationship found its genesis in other substantive goals established by Congress. Furthermore, the fact that Congress stated the state-federal relationship and substantive requirements of SMCRA in great statutory detail ultimately precluded the agency from developing acceptable accommodations through regulations or pragmatic actions.

The SMCRA established for the first time a comprehensive federal regulatory program to control the adverse environmental effects of both surface coal mining and deep coal mining.[18] The substantial importance of the coal industry to the nation underlies this regulatory program. In 1983, projections indicate that the industry will produce over 800 million tons of coal which will supply nearly

16. *See infra* notes 57-115 and accompanying text.

17. *See infra* notes 116-189 and accompanying text.

18. *See* E. IMHOFF, A GUIDE TO STATE PROGRAMS FOR THE RECLAMATION OF SURFACE MINED AREAS, U.S.G.S. CIRCULAR 731, RESOURCES AND LAND INVESTIGATIONS PROGRAM [RALI] (1976).

twenty percent of the total national energy needs and forty-four percent of the electricity. Approximately 17,000 coal mines and other facilities associated with the processing and handling of the mined coal will account for this production.[19] Over 2,000 separate business entities engage in coal mining, from the smallest "mom and pop" operations to the largest Fortune "500" industrial corporations or subsidiaries of such corporations. Nearly thirty states across the nation mine coal, with the largest concentration in the Appalachian states, the midwestern states, and the Rocky Mountain states.[20]

The Surface Mining Act has two major components: a program for reclaiming abandoned mined lands, established by Title IV;[21] and a regulatory program for current and future mining, set forth in Title V.[22] The abandoned mined lands program restores lands damaged by past mining through expenditures made over fifteen years from a fund capitalized by a fee on each ton of currently produced coal.[23] Importantly, the federal government must conduct the abandoned mined lands program without participation by the states until such time as a state has an approved regulatory program under Title V.[24] After that time, the state may control up to one-third of the funds collected from the coal mined in that state. Congress conceived Title IV as an inducement to state participation in the regulatory program as well as a means of restoring previously mined lands.

Title V defines the regulatory program for coal mining to be implemented by the states and the federal government. The program consists of five different elements.

First, Title V establishes a comprehensive scheme of environmental performance standards. These standards include the basic criteria with which mining must comply to assure protection of the land, water, and air resources adversely affected by mining activities. Section 515 of SMCRA, for example, sets forth the following requirements: restoration of the mined land to its approximate pre-mining original contour;[25] minimization of the disturbance to the hydrologic balance and to the quantity and quality of water;[26] restoration of the land's capability to support pre-mining land uses.[27] Section 515 also provides specific standards applicable to steep slope

19. OFFICE OF SURFACE MINING, UNITED STATES DEPT. OF INTERIOR, BUDGET JUSTIFICATION FY 1893, 11-12, R7 (1982).

20. *See* H.R. REP. NO. 218, 95th Cong., 1st Sess. 74-75 (1977).

21. 30 U.S.C. §§ 1231-1243 (Supp. III 1979).

22. *Id.* §§ 1231-1279.

23. *Id.* §§ 1231-1243.

24. *Id.*

25. *Id.* § 1265(b)(3). The constitutionality of this section was recently upheld in Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 101 S. Ct. 2376 (1981).

26. 30 U.S.C. § 1265(b)(10) (Supp. III 1979).

27. *Id.* § 1265(b)(2).

and mountain-top-removal mining practices.[28]

Title V further mandates a comprehensive application, permit, and bonding scheme to insure the gathering and evaluation of adequate information about the mining site before any mining takes place. This information must be considered whether or not the proposed mining and reclamation practices will cause environmental harm during mining and whether or not the land can be restored to support its pre-mining uses.[29] No permit may be issued unless the applicant makes, and the regulatory authority confirms, an affirmative demonstration of the information required by SMCRA.[30] Even after the operator completes mining he must keep a bond posted with the regulatory authority to assure the availability of some resources to maintain a successful reclamation plan.[31]

The third element of Title V establishes a procedure for states that wish to implement the regulatory program. These states must submit a proposed plan for approval to the Office of Surface Mining in the Department of the Interior (OSM).[32] If OSM finds that the plan meets the requirements of the Surface Mining Act and if the state implements regulations by the Secretary of the Interior, then the state assumes from OSM the primary jurisdiction for implementing Title V. If OSM does not approve the plan or if the state submits no plan, then the Department of the Interior must implement a federal regulatory program in the state that preempts any existing state program.[33]

Title V also outlines an inspection and enforcement scheme to be implemented both by OSM and any state wishing to have an approved state plan. Extremely detailed requirements make the inspection and enforcement scheme particularly notable.[34] If any inspector finds any violation of SMCRA or Department of Interior regulations at a mine-site, he must at least issue a notice of violation.[35] If the violation constitutes an imminent danger to the public or to the environment, the inspector must issue a cessation order that may shut down all or part of the mining operation.[36] Furthermore, a pattern of violations resulting from the unwarranted failure to comply will cause suspension or revocation of the permit.[37] Addition-

28. *Id.* § 1265(c)-1265(e). Since promulgation of the interim regulations on December 13, 1977, numerous judicial decisions have addressed these and other performance standards of SMCRA.
29. 30 U.S.C. §§ 1256-1258 (Supp. III 1979).
30. *Id.* § 1260.
31. *Id.* § 1259.
32. *Id.* § 1253.
33. *Id.* § 1254.
34. *Id.* §§ 1267, 1268, 1270, 1271.
35. *Id.* § 1271(a)(3).
36. *Id.* § 1271(a)(2).
37. *Id.* § 1271(a)(4).

ally, civil penalties may be assessed for any violation in an amount corresponding to the seriousness of the violation.[38] Violations can also result in criminal penalties and civil actions.[39] Citizen requests to the regulatory authority can trigger the inspection and enforcement procedures.[40]

Title V establishes a process by which the regulatory authority may designate certain lands as unsuitable for mining.[41] Thus, if lands may not be reclaimed, the agency must designate the lands as unsuitable for mining.[42] Also, if mining would be inconsistent with land use plans, adversely affect fragile or historic lands, or affect renewable resources or natural hazards, the agency may designate the land as unsuitable for mining.[43] Finally, Title V absolutely prohibits mining in certain specially designated areas, including national parks and forests, or within three hundred feet of a dwelling.[44]

Congress set forth in the statute a precise timetable for the various elements of the SMCRA to become operative. The permit, application, and bonding provisions, and the designation of lands unsuitable for mining procedures are not to be implemented until an approved state program or a federal program for a state exists.[45] SMCRA provides that states should submit proposed programs to the Department of the Interior no later than eighteen months after the passage of the Act, or twenty-four months if the state needs additional time for state legislative action.[46] The Secretary of the Interior must approve or disapprove of the state program within six months of its submission by the state.[47] If disapproved, the state may resubmit a revised plan within two months, with final action by the Secretary of the revision due two months later.[48] If a state program is not approved by June 3, 1980, then SMCRA requires the Secretary of the Interior to implement a federal program in that state.[49] Within eight months of the approval of a state program or the implementation of a federal program, all mining operations must comply with all provisions of Title V.[50] At the maximum, the full regulatory program of Title V would not become effective until thirty-four months after passage of SMCRA. A wide variety of factors, including delays

38. *Id.* 1268(a).
39. *Id.* §§ 1268(e), 1268(g), 1271(c).
40. *Id.* § 1271(a).
41. *Id.* § 1272.
42. *Id.* § 1272(a)(2).
43. *Id.* § 1272(a)(3).
44. *Id.* § 1272(e).
45. *Id.* § 1252(d).
46. *Id.* §§ 1253(a), 1254(a).
47. *Id.* § 1253(b).
48. *Id.* § 1253(c).
49. *Id.* § 1254(a).
50. *Id.* § 1256(a).

in promulgating regulations, excessive time required for submittal of state programs, and litigation over critical issues, prevented the achievement of the schedule for implementing full regulatory programs in each state. At this time, eight states have not effected the permanent program. In seven of these states, litigation preventing the imposition of such programs has caused the delay. The probability of a federal program exists in Georgia, and federal coal exploration programs have been proposed for Washington, Oregon, Massachusetts, Michigan, and Rhode Island.[51]

Congress adopted a more expeditious implementation schedule for certain of the performance standards and the inspection and enforcement provisions of the Surface Mining Act. Congress considered a thirty-four month delay after passage of the Act as inconsistent with the importance of certainty of the performance standards of section 515.[52] Therefore, Congress established an interim program, to be run by the state, implementing section 515.[53] The interim program of section 515 standards became effective for new mines on February 3, 1978 and for all mining operations on May 3, 1978.[54] This interim program establishes a national regulatory system under which the state permitting process existing prior to the passage of the Surface Mining Act continues to authorize mining in conjunction with certain additional federal standards. During the interim program, operations are subject to federal enforcement and inspection in addition to that carried out by the states.

As the Department of the Interior moved in 1977 to develop the programs giving life to SMCRA, its essential task was to implement the disparate elements of Title V as a logical whole within the tight timetables established by Congress. This task inevitably required the federal agency to confront several tensions inherent in SMCRA. The most important tension was between the proposed state-federal relationship and the detailed performance standards.

III. Legislative History of SMCRA

The legislative history of SMCRA stretches over a decade. Representative Morris K. Udall, one of the bill's prime sponsors, has described the history of the enactment of the SMCRA as a primer for politicians who wish to learn how to frustrate enactment of legislation that expresses the clear will of the majority of Congress.[55] Re-

51. 47 Fed. Reg. 560 (1982).
52. 30 U.S.C. § 1252 (Supp. III 1979).
53. *Id.* § 1252(c), 1252(e).
54. *Id.* § 1252(b), 1252(c).
55. Udall, *The Enactment of the Surface Mining Control and Reclamation Act of 1977 in Retrospect,* 81 W. VA. L. REV. 553 (1979).

The history of the Act would serve as a textbook for any national legislator desiring

view of the legislative history need not encompass the full breadth of congressional activity over a decade. However, the fundamental conclusions of Congress about the need for legislation controlling coal mining and the manner in which the federal government addressed the difficulties encountered in implementing SMCRA should be explored.

A. Establishing the Existence of a Problem

Section 101 of SMCRA,[56] the statement of congressional intent, provides the fundamental conclusion of Congress about the impact of coal mining and the concomitant need for federal legislation. Section 101 specifies that surface mining had created widespread disturbance of commerce and the public welfare by irreparably harming the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry uses through shoddy surface mining practices. Erosion, landslides, floods, water pollution, and the creation of virtual wastelands attributable to the coal mining industry had lowered, if not endangered, the quality of life for plants, animals, and humans. Additionally, destructive effects of mining offset actions taken to conserve and protect soil, water and other natural resources.[57]

The land use problem identified in section 101(c) relates to the nation's industrial, residential, and agricultural development. Congress saw adverse environmental impacts, while depicted as local in nature, as undermining other governmental interests and programs. Conclusions obtained as a result of numerous field tours and the testimony of many witnesses at congressional hearings supplied the basis for these findings.[58]

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to thwart the clear will of the majority of the Congress . . . [A] legislative endeavor involving 183 days of hearings and legislative consideration, eighteen days of House action, three House-Senate Conferences and reports, eleven Committee Reports, two Presidential vetoes, approximately fifty-two recorded votes in the House and Senate, and the machinations (and statesmen-like conduct) of three Presidents is an activity ripe for scholarly analysis, let alone the stuff for a pretty good novel.

Id.

56. 30 U.S.C. § 1201 (Supp. III 1979).

57. *Id.* § 1201(c). Subsection (c) provides the following:

(c) many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property, by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.

Id.

58. For example, The Senate Committee on Interior and Insular Affairs reported the following in 1973:

Coal surface mining activities, in particular, have imposed large social and environmental costs on the public at large in many areas of the country in the form of un-

The SMCRA seeks to establish a national program to end this nationwide destruction of the country's land and water resources, although Congress viewed a strong regulatory program as timely and essential for national economic reasons as well.[59] Because Congress anticipated a shift from petroleum to coal to supply America's energy needs, section 101(d) reflects an intent that environmental values and the health and safety of the public not be sacrificed to supply cheap energy.[60] While some have suggested that section 101(d) could serve as an expression of congressional intent to limit the stringency of the regulatory program and encourage the wholesale shift to coal,[61] a letter by James Schlesinger, Assistant to President Carter, cogently addresses congressional concern for the overall welfare of the nation in the long-term.[62] Mr. Schlesinger noted that adequate safeguards for land-bearing coal resources harmonize with the policy of expanded coal production. The vast coal resources of this nation afford us the luxury of selectively choosing the areas to be mined.[63] Furthermore, a national regulatory scheme for environmentally sound coal mining would erase the uncertainties surrounding the rules for proper mining practices. This, in turn, should create a climate conducive to greater coal production.[64] In a floor debate on the SMCRA, Senator Henry Jackson echoed the position of Mr. Schlesinger by stating that "one of the major inhibiting factors to coal development in all coal regions of the country—East and West—is the failure to establish federal surface mining standards. Our coal in-

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reclaimed lands, water pollution, erosion, floods, slope failures, loss for fish and wildlife resources, and a decline in natural beauty. Uncontrolled surface coal mining in many regions has effected a stark, unjustifiable, and intolerable degradation in the quality of life in local communities.

S. REP. NO. 402, 93d Cong., 1st Sess. 33 (1973).

59. Congress found that

the expansion of coal mining to meet the Nation's energy needs makes even more urgent the establishment of appropriate standards to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public.

30 U.S.C. § 1201(d) (Supp. III 1979).

60. H.R. REP. NO. 218, 95th Cong,, 1st Sess. 61 (1977); *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 599.

61. *See generally* Gage, *The Failure of the Interim Regulatory Program under the Surface Mining Control and Reclamation Act of 1977: The Need for Flexible Controls,* 81 W. VA. L. REV. 595 (1979).

62. H.R. REP. NO. 218, 95th Cong., 1st Sess. 166 (1977), *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 697-98.

63. Adequate safeguards of the land are not in conflict with a policy of expanded coal production. The Nation's coal resource is quite large and the portion of that resource made unavailable by this legislation is extremely small. . . . Fortunately, the great abundance of coal in this country allows us to declare certain areas off limit to strip mining because of their greater value for competing purposes.

Id.

64. Years of controversy over this legislation have increased the uncertainties facing the coal industry and the prospects for relying on more coal in this country. One particular reason I am eager to see the bill pass is, finally to create a sense of certainty about the rules by which coal strip mining can take place.

Id.

dustry must know what the guidelines are in order to be able to plan their investments and proceed with mining."[65]

B. Developing Environmental Performance Standards

Congress followed two mutually contradictory paths in crafting the regulatory program of SMCRA. With respect to implementation, SMCRA evolved in a manner that gave primary administrative responsibility to the states. At the same time, consideration of substantive performance standards produced a complex set of statutory requirements that provided little opportunity for flexibility on either the part of the Department of the Interior or the states.

1. The Allocation of Authority Between the State and Federal Governments.—Congress passed the Surface Mining Act against a background of widespread, but weak, state legislation regulating strip mining. Although states strengthened their legislation over the decade in which federal authority was considered and passed, Congress did not abandon the idea of the need for national regulatory program.

In 1977, a Senate Report on the status of existing state mining regulations concluded that the states tailored their regulatory programs to accommodate present mining practices rather than to incorporate environmental standards into the statutory framework. This failure to recognize environmental values had caused mining practices to result in unacceptable or permanent damage and necessitated action by the federal government.[66]

Notwithstanding a continuing commitment to a federally mandated change in the conduct of mining, the congressional attitude about the relationship between the states and the federal government underwent an early and important change to allow for a clear opportunity for major state responsibility in implementing SMCRA.

The first bill to pass either house of Congress was House Bill 6482, which passed the House of Representatives on October 11, 1972.[67] House Bill 6482 would have established a complete federal regulatory program, including federal permits, which would have been effective six months after passage of the bill.[68] House Bill 6482 modeled the federal-state relationship in mining regulation after the Federal Water Pollution Control Act.[69] The scheme envisioned by

65. 123 CONG. REC. 7998 (daily ed. May 19, 1977) (statement of Senator Jackson).

66. S. REP. NO. 128, 95th Cong., 1st Sess. 51 (1977). A congressional research service study of state surface mining regulation supplied the basis for the conclusion in the Senate Report that areas of inadequacy existed in both state laws and regulations as well as in the capability of the states to enforce their laws and regulations. *Id.*

67. 118 CONG. REC. H. 35,031-38 (daily ed. Oct. 11, 1972).

68. *Id.*

69. 33 U.S.C. §§ 1251-1376 (1976 and Supp. III 1979).

the Bill required that a complete regulatory program be implemented at the federal level. Subsequently, a state could choose to displace the federal program with a state program that met federal standards.[70] When Congress moved to consider coal mining legislation in the ninety-third Congress, a profound but subtle shift in attitude could be detected. In the final form of the surface mining legislation, both the Senate[71] and the House[72] proposed to greatly enhance state participation.[73]

The new, proposed mining legislation created an interim, federal regulatory program which, while providing for early implementation of selected federal performance standards, used existing state permit programs. Both bills strongly encouraged the states to submit programs that would provide for state implementation of the permanent and complete regulatory scheme.[74] Only if a state failed to submit such a program or have its submitted program approved by the Secretary would a federal regulatory program, including federal permits, be put in place. Both Senate Bill 425 and House Bill 1150 eliminated the federal permit system, except as a "last resort."[75]

Congress did not follow the prevailing model for federal environmental regulatory programs, which, in the case of the early bills, meant a full federal regulatory program within six months of the Act's passage. Instead, Congress moved to an interim program based on state procedures with a substantial period of time allowed for the states to assume primary responsibility for implementation of the full program. This approach to the state-federal relationship remained constant through the succeeding years during which the legislation was considered. There was, however, substantial evolution in other areas of the statute, which impeded the achievement of state primacy in the first years of SMCRA's implementation.[76]

The legislative history does not reveal specific reasons for this shift; however, several possible reasons can be deduced. First, the members of Congress believed that the site-specific nature of the en-

70. 118 CONG. REC. H. 35,031 (daily ed. Oct. 11, 1972).

71. S. 425, 93d Cong., 1st Sess. (1973); S. REP. No. 402, 93d Cong., 1st Sess. (1973).

72. H.R. 11500, 93d Cong., 2d Sess. (1973); H.R. CONF. REP. No. 1522, 93d Cong., 2d Sess. (1973).

73. To understand the nature of the shift, one must recognize that the permitting process functions centrally in any complete regulatory program. In the case of SMCRA, it operated as the key mechanism for implementing the bill's objective to "effect changes in those mining practices which result in unacceptable or permanent environmental damage." S. REP. No. 128, 95th Cong., 1st Sess. 52 (1977).

74. S. 425 stated, "Each State . . . shall submit to the Secretary, by the end of the eighteen month period beginning on the date of enactment of this Act, a State program which demonstrates that such state has the capability of carrying out the provisions of this Act and meeting its purposes . . ." H. CONF. REP. No. 1522, 93d Cong., 2nd Sess., § 503(a) at 20 (1973).

75. S. REP. No. 402, 93d Cong., 1st Sess. 52 (1973).

76. *See infra* note 80 and accompanying text.

vironmental and social impacts of strip mining required a high level of state involvement.[77] Second, while many states remained hostile to the idea of any federal legislation, others eagerly anticipated the legislation, provided that they were permitted to assume major responsibility.[78] Third, the Nixon and Ford Administrations clearly favored enhanced and strengthened state participation in administration of federal programs.[79] Notwithstanding a well-documented history of ineffective regulation, the political climate and the site-specific nature of mining problems led Congress to adopt an approach relying on a strong state role in regulation.

2. The Regulatory Requirements.—The manner in which Congress addressed the central substantive requirements of SMCRA complicated the state-federal relationship. The legislative history of these requirements demonstrates the reason for their inconsistency with the previous pattern of the state-federal relationship in environmental regulations. Congressional debate of the proposed mining legislation shows concern for two fundamental issues: first, the possible absolute prohibition of mining in certain areas; and second, when mining is permitted, the content of environmental protection criteria and the method of statutorily setting forth these criteria. In addressing these two issues, Congress developed an increasingly complex and rigorous legal structure that provided few opportunities for state departures as the states assumed primacy in SMCRA's implementation.

The SMCRA resulted from an effort to ban strip mining altogether. In 1971, Congressman Ken Hechler of West Virginia, with over one-hundred co-sponsors, introduced a bill in the House of Representatives that would have banned all strip mining six months after passage.[80] As the legislation progressed through subsequent years of refinement in the legislative process, absolute prohibitions on strip mining yielded to increasingly precise delineation of limited

77. *See* 30 U.S.C. § 1201(f) (Supp. III 1979), which provides as follows: "[B]ecause of the diversity, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the states." *Id.*

78. *Regulation of Surface Mining: Hearings before the Subcomm. on Env. and Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs,* 93d Cong., 1st Sess. 879-84 (1973) (statement of Walter Heine, then Deputy Secretary for Mines and Land Protection, Pennsylvania Department of Environmental Resources).

79. In a letter dated February 6, 1975, President Gerald Ford set forth the Administration's concern that even S. 425 "could (1) lead to unnecessary Federal preemption, displacement or duplication of State regulatory activities, and (2) discourage States from assuming an active permanent regulatory role. . . ." S. REP. No. 28, 94th Cong., 1st Sess. 236 (1975).

80. Dunlop, *An Analysis of the Legislative History of the Surface Mining Control and Reclamation Act of 1975,* 21 ROCKY MTN. MIN. L. INST. (1975) [hereinafter cited as *1975 Legislative History*].

areas within which mining would be proscribed or would be allowed only pursuant to the most rigorous controls.

Tracing the fate of the attempt at an outright ban illustrates how the continuous process of refinement produced ever more complex statutory language. The ban proposal never emerged from the House Committee. Nonetheless, House Bill 6482, as passed by the House of Representatives, prohibited mining on slopes greater than twenty degrees from the horizontal unless the mining operator could affirmatively show both the unlikelihood of resulting environmental damage and the actuality of post-mining reclamation.[81] Although House Bill 6482 purported to allow steep slope mining, many interpreted it as a *de facto* ban on steep-slope mining[82] because of the impossibility of making the required showings. The bill, as finally enacted in late 1974 by the ninety-third Congress, further elaborated the controls on steep slope mining by providing for additional specific performance standards that added emphasis to the general language of House Bill 6482.[83] The Senate refused to accept an effort by the House of Representatives to allow a variance from the requirement that mined land be returned to the approximate original contour in certain steep slope situations.[84] Congress maintained the posture of theoretically allowing steep-slope mining but only with constraints that made it practically impossible through the next consideration of the bill during the first session of the ninety-fourth Congress.

However, when the ninety-fifth Congress considered strip mine legislation during early 1977, the adoption of a variance procedure that had been previously suggested for mountain-top removal mining by the ninety-third Congress substantially weakened the potential restriction on steep-slope mining caused by strict performance standards.[85] This procedure essentially removed the requirement that steep-slope mined land be restored to approximate original con-

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81. H.R. 6482 provides,

> *Provided,* That no such overburden will be removed from slopes greater than 20 degrees from the horizontal, unless the operator can affirmatively demonstrate that sedimentation, landslides, or acid or mineralized water pollution can be feasibly prevented and that the areas can be reclaimed as required by the provisions of this Act.

STAFF OF THE HOUSE COMM. ON ENVIRONMENTAL AND NATURAL RESOURCES, 92d CONG., 2D SESS., CONGRESS AND THE NATION'S ENVIRONMENT 203 (Comm. Print 1973).

82. *Id.*

83. In support of this prohibition, Hechler argued,

> The effect of the 20-degree amendment would have been to save Appalachia and the more mountainous areas throughout the Nation where the effects of strip mining of coal are the most devastating. The 20-degree amendment is no concept plucked out of nowhere, but is in face a well-established and reasoned approach which has been well thought-out over the years.

Id. at 28.

84. H.R. CONF. REP. NO. 1522, 93d Cong., 2d Sess., §§ 515(c) & (d), at 39-41 (1974).

85. 30 U.S.C. § 1265(e) (Supp. III 1979).

tour, provided the mining site is subsequently used for a beneficial purpose; it also mitigated the impact of certain other performance standards. The progress of the mining legislation through the House and Senate illustrates one of the ways in which congressional compromise affects agency performance. The proponents of steep-slope mining successfully defeated the outright ban, while permitting highly restrictive controls over such mining. The proponents expected that the responsible regulators would be sufficiently flexible in applying these controls to avoid the prohibition of mining. On the other hand, opponents of steep-slope mining abandoned the prohibition upon the expectation that the controls would be strictly applied and thus prohibit much, if not all, steep-slope mining. This circumstance will effectively prevent those charged with implementing the statute from responding to congressional intent.

The foregoing discussion illustrates a persistent theme in SMCRA's development. Congress would initially consider a simple and stringent limitation or prohibition on mining and then gradually move away from that position by subjecting the regulatory agency to extensive, precise, and rigid criteria. One commentator expresses the following on this phenomenon:

> It is unclear whether the opponents or proponents of the legislation have gained more from the repeated veto actions and continuing consideration of the Federal strip mine bill. . . . It appears, however, that each time Congress reassesses this legislation those additional variances granted to the industry are balanced by more precise specificity in both language and legislative history, thus neutralizing industry enthusiasm for the legislation, if not stimulating increased opposition to it.[86]

A number of other areas illustrate the pattern found in the steep-slope provisions of the Act. For example, in protecting prime farm land,[87] alluvial valley floors,[88] and hydrologic systems,[89] Congress retreated from an absolute prohibition on mining by adopting increasingly detailed specificiations governing the manner of mining.

In addition to considering whether to allow mining in certain circumstances, Congress had to develop environmental protection standards controlling the mining in areas where the SMCRA permitted mining. Certain general issues emerge from the legislative history. Several of these issues, including the purpose of the federal standards, the relationship between specific federal performance standards, and state responsibility for implementing and enforcing those standards provide a backdrop for examining SMCRA's

86. *1975 Legislative History, supra* note 80, at 28.
87. 30 U.S.C. § 1265(b)(7), 1260(d) (Supp. III 1979).
88. *Id.* § 1265(b)(10), 1260(b)(5).
89. *Id.*, § 1263(b)(10).

scheme of performance standards and the extent to which the scheme should be applied in all mining situations.

Congress designed the SMCRA standards to prevent degradation of the environment during active mining operations and to assure the restoration of land to pre-mining quality. The goal of reclamation is advanced not only by the legislative prohibition of mining in areas that are incapable of being adequately restored after mining, but is also furthered by the specific standards for proper reclamation work.[90] Even in the absence of a specific prohibition in the Act, mining will not be permitted at sites where mining activity and environmental protection are mutually exclusive. Congress thoroughly addressed the issue of environmental protection because, with few exceptions, it viewed mining as a temporary use of land. In order to prevent this temporary use from destroying long-term beneficial uses of a site, Congress incorporated specific environmental goals into the permit approval process and the standards for proper mining practices.[91]

Reconciling federally mandated, nationwide environmental protection standards with state administrative primacy and the site-specific nature of mining caused a problem that Congress dealt with minimally and only through consideration of two separate issues: the detail of the federal statutory standards and the permissible extent of the statutory language for granting variances. If Congress opted for very general performance standards and broad variances, then states could assume the regulatory leadership in adapting them to particular local conditions. If, however, Congress articulated the standards with detail and little opportunity for variances, then the state primacy role would, in substance, serve the congressional purpose.

Difficulty surrounded the resolution of the statutory detail issue. Members fully recognized that generality in the definition and description of protection goals would afford the states substantial freedom within which to continue their weak regulatory requirements—the state of affairs that the federal law was designed to change[92]—and allow for much agency discretion. Furthermore, as Congress retreated from specific efforts to ban mining on environmentally sensitive land, it added detailed statutory language to control the conduct of mining on those lands. In addition, the importance of some issues, such as approximate original contour, permitted little room for flexibility.[93]

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90. S. REP. No. 402, 93d Cong., 1st Sess. 32 (1973).
91. H.R. REP. No. 95, 94th Cong., 1st Sess. 90 (1975).
92. H.R. REP. No. 1445, 94th Cong., 2d Sess. 23 (1975).
93. *Id.* at 48-51.

Congress emphatically rejected the idea of giving the states the power to grant operator variances from the SMCRA performance standards. Congress expressed the fear that, while a broad delegation of power to the states would harmonize with the goals of federalism and site-specific application of mining regulation, states would grant variances too generously. Congress considered the environmental performance standards embodied in SMCRA too important to be rendered meaningless through lax state implementation,[94] and, therefore allowed only very limited variances to the performance standards. The use of precise language to describe the nature of the variance[95] illustrates congressional refusal to give the states flexibility to adapt SMCRA's performance standards to their diverse environments. Thus, while section 101(f) of SMCRA nominally recognizes the need for site-specific application of mining regulation,[96] the statute also sets forth numerous specific performance standards with no suggested mechanism for a state to vary from those standards other than section 505 of the Act. Section 505 only allows the states to adopt standards that are *more stringent* than those in SMCRA.[97]

The legislative reports on SMCRA expressed the success that Congress believed it had achieved in meeting the problem of reconciling national requirements with local conditions and limitations.[98] Congress felt that the avoidance of excessive detail in the SMCRA requirements made the performance standards flexible. SMCRA supposedly reflects a middle ground between an overly broad delegation of authority to an agency and the burdensome detail characterizing state mining legislation. Congress recognized that overly detailed legislation often fails to fully implement legislative goals, as was demonstrated by the history of state coal mining regulation. The excessive detail of state mining programs was, however, attributed to the rules and regulations promulgated by state agencies.[99]

Thus, although Congress paid lip-service to the concept of state-formed standards in section 1201(f) of the Act[100] and established a state-federal relationship which enhanced that concept by providing for state primacy in implementation of SMCRA's requirements, in developing actual standards, Congress did not explicitly provide mechanisms for recognizing state differences. Ironically and in spite of the intention to employ specificity to respond to local concerns,[101]

94. S. REP. No. 28, 95th Cong., 1st Sess. 55 (1977).
95. *See supra* note 77 and accompanying text.
96. 30 U.S.C., § 1201(f) (Supp. III 1979).
97. *Id.* § 1255.
98. H.R. REP. No. 95, *supra* note 91, at 79.
99. *Id.*
100. 30 U.S.C. § 1201(f) (Supp. III 1979).
101. The concern over requiring a return to approximate original contour and the increas-

the congressional use of highly detailed environmental performance standards and the clear limitation on variances precluded any meaningful state-by-state flexibility.

3. Developing an Enforcement Program.—SMCRA's enforcement provisions also reflect unnecessary rigidity attributable to the detail of the statutory language. Congress perceived the enforcement provisions as an essential aspect of the regulatory scheme, particularly in establishing a workable state and federal relationship in mining regulations; however, the language of the enforcement provisions of SMCRA, as it evolved during the legislative process, did not support that relationship.

The enforcement and inspection provisions in the 1974 Conference Committee Report[102] are similar to those that Congress finally signed into law three years later. Having fashioned an elaborate system for supposedly accommodating state and federal interests in the administration of the regulatory program, Congress theoretically had to fashion an enforcement scheme which reinforced the accommodation. Accordingly, federal inspection and enforcement activities structurally reflected the differences in the role of the federal government during the interim and the permanent programs.

During the initial stages of developing the proper balance between SMCRA requirements and state needs and conditions, direct authority for mining regulation rests with the federal government.[103] While the mining program in this interim period operates through the framework of existing state administrative and permitting processes, the Department of Interior's Office of Surface Mining must maintain a federal enforcement program that includes inspections and enforcement actions.[104] Section 521 of SMCRA, not state administrative law and procedure, governs federal enforcement for the interim period.[105] The states use the interim period to develop and submit a program for the state's assumption of primary authority for surface mining regulation within the state. If the state obtains approval from the Department of Interior for their mining program, the federal government assumes an oversight role in administration and enforcement.[106]

Congress recognized that problems of unnecessary and wasteful duplication could arise from the dual enforcement program of the

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ingly detailed language of the statute resulted largely from the regional concern of the Appalachian states.

102. H.R. CONF. REP. No. 1522, 93d Cong., 2d Sess. 43-51 (1974).

103. 33 U.S.C. § 1252 (Supp. III 1979).

104. H.R. CONF. REP. No. 1522, *supra* note 102, at 43-51.

105. 30 U.S.C. § 1252 (Supp. III 1979). *See also* H.R. CONF. REP. No. 1522, *supra* note 102, at 43-51.

106. 30 U.S.C. § 1252(e) (Supp. III 1979).

interim period because the federal program would overlap state activity.[107] The failure of the states to vigorously enforce state mining regulations demonstrated to Congress the crucial importance of the interim period as a smooth transition from ineffective state programs to the uniform and equitable SMCRA mining program. The addition of the federally mandated performance standards, federal funds for enforcement activities, and the expertise of the Office of Surface Mining, should foster enforcement during the interim period at the level of effectiveness envisioned for permanent program.[108]

In the enforcement and inspection scheme, Congress did two things to insure the goal of improved state enforcement programs. First, Congress attempted to limit the discretionary nature of enforcement actions by mandating action by the inspector during an inspection.[109] Second, and equally important, SMCRA explicitly provides that no state program can be approved for primacy unless the program has enforcement and inspection provisions similar to those set forth in the federal act.[110]

Congress intended, in the enforcement provisions of SMCRA, to adopt a rigorous scheme that would also fit into the overall structure established for state and federal relations. Inevitably, especially during the interim program with its provisions for direct federal inspection and enforcement, conflicts arose between the states and the federal government.

This discussion of the language and legislative history of SMCRA suggests that Congress, in designing the regulatory program, chose to simultaneously follow two different paths. With respect to the procedural question of allocating responsibility between the federal government and the states, Congress chose a route that maximized the opportunity for state responsibility. However, when Congress addressed substantive issues, such as performance standards and enforcement techniques, its desire to assure an end to identified national problems precluded state leeway to adjust the statute's precise and detailed directives. Accordingly, literal implementation of the substantive provisions of SMCRA necessarily posed challenges to achieving the mandated state-federal relationship.

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107. S. REP. NO. 28, *supra* note 94, at 180.

108. H.R. REP. NO. 95, *supra* note 95, at 118. "For a number of predictable reasons—including insufficient funding and the tendency for State agencies to be protective of local industry—State enforcement has in the past often fallen short of the vigor necessary to assure adequate protection of the environment." *Id.*

109. Section 1267(c) details inspection intervals and requires that reports of all inspections be filed. 30 U.S.C. § 1267(c) (Supp. III 1979). Section 1271(a) details the options of an inspector when a violation is noted at a site. *Id.* § 1271(a). The inspector's only discretionary power is to determine the immediacy of the danger to health and safety from the violation, but even that is subject to SMCRA guidelines. *Id.* § 1291(8).

110. *Id.* § 1253(a), § 1268(i), and § 1271(d).

IV. Implementation of the New Law

After enactment of SMCRA, tensions emerged between the state primacy goal and the implementation of performance standards and enforcement provisions.[111] The detailed and mandatory nature of important SMCRA provisions made it virtually impossible for OSM to achieve all of the central themes of the congressional purpose. The internal tensions created by the statutory language of SMCRA confronted the Department of Interior as it tried to draft the regulations for interim mining programs and then began to apply the regulations in the field. The Department of Interior attempted, to the extent possible, to literally implement the statute's conflicting purposes. The inflexibility of the statutory language afforded little opportunity for OSM to develop a program that would avoid conflict and also reflect congressional intent. In a few instances, however, when the statutory language was sufficiently flexible and events required it, OSM attempted to develop a regulatory program that departed somewhat from congressional purpose to avoid unnecessary conflict or to meet policy objectives. Because the permanent program contained even more detailed statutory language than the interim program, OSM encountered a more difficult task in attempting to accommodate the conflicting purposes. The attempted accommodation ultimately failed.

A. The Interim Regulations

Two issues clearly emerged in the drafting of the interim regulations[112]—the regulatory description of the state-federal relationship and the breadth of the substantive environmental protection standards to be applied during the interim period.

Under the Act, a period of up to thirty-four months could elapse before a permanent state or federal program would exist to implement the Act's provisions.[113] The Act also required promulgation of regulations establishing an interim program of federal environmental protection standards, federal inspection, and federal enforcement within ninety days of enactment.[114] Although Congress considered the role of the interim program at length the regulatory substance of the program was crucial because the interim phase would define crit-

111. *See generally* COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFFICE, ISSUES SURROUNDING THE SURFACE MINING CONTROL AND RECLAMATION ACT (1979).

112. The regulations for the initial regulatory program were published in proposed form for public comment in the FEDERAL REGISTER on September 7, 1977. Public hearings were held in five cities during the period September 20-22 for the purpose of soliciting further public comment. The interim program regulations were published in final form in the FEDERAL REGISTER on December 13, forty days beyond the statutory date of November 3, 1977.

113. *See supra* note 46 and accompanying text.

114. 30 U.S.C. § 1251(a) (Supp. III 1979). *See also supra* note 90.

ical issues for both the federal and state governments and set the stage for regulatory development of the permanent program.

1. The State-Federal Relationship.—The interim regulatory program functions as a hybrid creation because it provides for state administration of federal standards through existing state permitting systems and also provides for state and federal enforcement of those standards.[115]

Although the states played an informal role in drafting the interim program regulations, through *ad hoc* participation in the work of the Department of the Interior, state participation cannot be characterized as establishing the federal interim environmental performance standards within state legal structures. The gap in state-level involvement in drafting the interim regulations created several legal and practical problems. A key issue was whether or not the direction to the states contained in section 502 of the Act,[116] regarding state issued permits, constituted a violation of the tenth amendment.[117] A second legal problem associated with the congressional scheme derived from the states' concern that, even if Congress could constitutionally direct them to issue permits containing particular federally mandated conditions, attached, the permits might not be authorized by state law. Pragmatically, many states questioned their capacity to administer and enforce the new requirements in so short a time, especially if, as they believed, the program required changes in state enabling legislation.

The agency's first response to the congressional directive, reflected in early drafts of the interim program regulations, placed a duty on the states to issue permits that required specific compliance with the federal performance standards.[118] If adopted as final, these regulations would have occasioned the political anger of the states and generated immediate litigation based on the tenth amendment. The Department, therefore, ultimately rejected these proposals and reverted to proposing hortatory language, urging, but not compelling, the states to impose the interim performance standards.[119] The

115. 30 U.S.C. § 1252(b) (Supp. III 1979).

116. *Id.*

117. The tenth amendment states, "The powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively or to the people." U.S. CONST. amend. X. Much of the litigation involving SMCRA has been based on the tenth amendment; however, it has been the performance standards that have been challenged, not the administrative allocation of implementing authority. *See* Hodel v. Virginia Surface Mining Assn., 101 S. Ct. 2352 (1981).

118. Section 710.4(b) provides, "The states are responsible for issuing permits . . . to insure compliance with initial performance standards. . . ." Section 720.12 provides, "The Act contemplates that the state will enforce the performance standards." *See* 42 Fed. Reg. 44920 (1977).

119. "[I]f a state is enforcing the performance standards . . . that state shall incorporate terms in . . . permits that comply with those standards." 30 C.F.R. § 720.12(a) (1981).

final form of the regulations did not specify when the Department of the Interior would require a state to incorporate performance standards into the state mine-permit process during the interim period. Additionally, the final regulations gave no guidance on what "terms" a state should require in their permits.[120]

Although the statutory language clearly specifies the legal responsibility of states during the interim program,[121] the federal government did not confront the states on the issue directly because of the legal and political objectionability that would result from a literal application of the regulations. Beyond the legal problem, the most rigorous application of the statute's language would have conflicted with what the states believed they had gained in the long legislative battle for state primacy. The rather sparse statutory language allowed an accommodation of the realities of the state-federal relationship in the interim regulations.[122] Furthermore, the approach reflected the strong congressional preference for a state-lead program. Although the congressional interest in a state-lead program had focused on the permanent program, and for the interim had been more towards federal leadership, the decision by the agency not to articulate in regulations the maximum exercise of the federal power was well-received by the states.

Although the process avoided the constitutional conflict, the statutory requirement that states insure operator compliance with the federal performance standards[123] remained the basis of the interim program and, therefore, had to be implemented. The pre-existing state mining programs provided the structure for the interim implementation of SMCRA's performance standards; therefore, the federal government and the states had the option of implementing SMCRA's interim program on an *ad hoc* basis, dependent upon practice and attitude of each of the several states. The highly detailed and extensive nature of the performance standards that the interim program required the states to impose on operators and the ever-present specter of federal enforcement made the development of a workable federal-state relationship more difficult. Thus, precise substantive standards in the Act inconsistent with the Act's state-led concept, frustrated successful implementation of the scheme for federal-state relations from the beginning.

2. The Interim Performance Standards.—For a totally new program being established on a tight schedule, SMCRA generated

120. *Id.*
121. 30 U.S.C. § 1252 (Supp. III 1979). *See also supra* notes 66-79 and accompanying text.
122. *See supra* notes 115-20 and accompanying text.
123. 30 U.S.C. § 1252 (Supp. III 1979).

an extraordinary number of congressional mandated performance standards to be implemented by the states and the federal government during the interim period. The performance standards, while scattered in different sections of the statute, are concentrated in section 515[124] for surface mining and section 516 for deep mining.[125] Section 515 occupies more than five pages of the United States Code and provides more than twenty-five detailed requirements for reclamation.[126] The legislative history suggests that a number of strong congressional concerns led to this result. These concerns include a desire for a national, minimum standard and a desire to prohibit mining unless total restoration of the land could be insured after mining ceased.[127]

In considering SMCRA for over five years, however, Congress failed to recognize its work product as simply an accumulation of an extraordinary amount of detailed technical information about mining and a transformation of that knowledge into statutory requirements for the industry. In addition, continued debate about particular issues, coupled with reconsideration and compromise, produced a constantly refined legislative product characterized by attention to infinitesimal detail. Congress did not foresee that this fine attention to every nuance of reclamation would affect achievement of other purposes of the statute, especially the design for state-federal relationships.

In the case of both the Clean Air Act[128] and the Federal Water Pollution Control Act,[129] Congress avoided the opportunity to establish lengthy and precise performance standards for achieving goals. Instead, Congress provided the Environmental Protection Agency (EPA) with rather broad language within which to develop specific regulatory programs. Necessarily, EPA had substantial flexibility to adapt the statute's requirements to existing conditions and to develop an approach to implementation that allowed gradual adjustment to the new requirements by the newly regulated industries.[130]

Both the detailed, mandatory nature of SMCRA's requirements and the accelerated, rigid nature of the implementation schedule afforded the agency no flexibility to adjust legislative requirements to existing conditions in the industry and the states. By February 3, 1978, all new mines had to conform with the statute's interim program enforcement standards,[131] and three months after that existing

124. *Id.* § 1265.
125. *Id.* § 1266.
126. *Id.* § 1265.
127. *See supra* notes 55-110 and accompanying text.
128. 42 U.S.C. §§ 7401-7642 (1976 and Supp. III 1979).
129. 33 U.S.C. §§ 1251-1376 (1976 and Supp. III 1979).
130. 1 GRAD, TREATISE ON ENVIRONMENTAL LAW, chs. 2, 3 (1981).
131. 30 U.S.C. § 1252(b) (Supp. III 1979).

mines had to comply.[132] A mandated federal enforcement program overseeing both industry and the states would assure compliance.[133] The schedule and requirements left minimal time for the states to adjust their programs to serve as vehicles for the new federal standards and assured frequent confrontations over program administration in both the field and in state capitols.

Even absent the time factor, the statutory specificity of the performance standards would have left neither the states nor the federal agency the latitude to pick and choose between the mandated requirements in order to fashion a program that moved more gradually toward full implementation of the federal requirements. The tension that grew out of the process of blending existing state programs and accelerated, detailed, federally enforced performance standards carried over to the second phase of the program—the development of permanent program regulations.

An agency decision to implement as many of the Act's performance standards as soon as possible in the interim program worsened the inherent statutory tension. Given the complexity of putting the interim program in place through existing state programs and the resultant tension at the state level, this decision only mistakenly exacerbated state-federal relations to the point of substantially impairing program acceptance.[134]

3. Consequences.—The development of detailed and mandatory performance standards proved manageable during the interim program precisely because the agency's flexible approach to the state-federal relationship allowed for accommodation of merging state abilities and interests.[135] In effect, the states continued their pre-existing regulatory programs with modifications imposed only as the states determined that their administrative capacity, technical ability, or industry interest could absorb them. The "Heine-Callaghan letter,"[136] in which the federal government recognized West Virginia's primacy in applying various substantive requirements to the mining industry in that state, best characterizes this reasonable approach. In consequence of this approach, the majority of mining operations conducted during the interim program, especially ones existing prior to enactment of SMCRA, did not utilize state permits setting forth in engineering detail the methods of meeting the federal

132. *Id.*

133. *Id.* § 1252(c).

134. *See* COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFFICE, ISSUES SURROUNDING THE SURFACE MINING CONTROL AND RECLAMATION ACT, 4-22 (1979).

135. *See supra* notes 115-23 and accompanying text.

136. This letter is referred to and described in some detail in Rochow, *The Far Side of Paradox: State Regulation of the Environmental Effects of Coal Mining,* 81 W. VA. L. REV. 559, 587 (1979).

requirements. This achieved the state primacy goal of SMCRA, but sacrificed congressional desire for immediate and rigorous implementation of the performance standards.[137]

While the OSM approach resolved most debates between administrators in state capitols and OSM headquarters in Washington, D.C., the enforcement provisions of SMCRA still permitted field conflicts between federal and state mine inspectors. OSM, therefore, adopted a transition enforcement policy to give the states and the industry a period within which to adjust to the new regulatory regimen. The OSM transition policy significantly modified the statute's interim enforcement program. Specifically, the transition policy allowed federal inspectors to issue warnings (the statute mandates issuance of a notice of violation or show cause order),[138] to cite only major violations (the statute requires enforcement against all violations),[139] to make joint inspections with state officials (the statute appears to contemplate separate functions),[140] and to defer to state inspectors (allow a state inspector to write the ticket, again contrary to the mandatory burden the statute places on the federal inspector). OSM's transition enforcement policy clothed its inspectors and regional personnel with considerable discretion. This caused policy variations from region to region depending on the problems in the region. OSM's adjustments to the statute resulted in, on the one hand, relative harmony in the field, and, on the other, legal action brought against the agency by various citizens groups.[141]

The enforcement scheme in section 502 put the states and OSM on a collision course. OSM's attempts to avoid the collision led to significant departures in administrative application of SMCRA. Each change by the agency attempted to lessen the tension created by the congressional scheme and to develop a more workable relationship between the two levels of government. A rough field partnership began to emerge in the eastern states during the administration of the interim program, except in the case of states

137. This accommodative approach did not satisfy Illinois and Virginia and these states initiated litigation designed to overturn important elements of the interim program, namely the provisions controlling the conduct of mining on prime farm lands and steep slopes. Claims that the statute was being applied in a manner far too restrictive given the nature of mining in those states supplied the theme for this litigation. In both suits the court concluded that the language of the statute properly authorized the agency action. *In re* Surface Mining Regulation Litigation (*I*), 452 F. Supp. 327 (D.D.C. 1978), *aff'd per curiam sub nom.* National Coal Ass'n v. Andrus, 627 F.2d 1346 (D.C. Cir. 1979).

138. 30 U.S.C. § 1271(a)(2), (a)(3) (Supp. III 1979).

139. *Id. But see* COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFFICE, ISSUES SURROUNDING THE SURFACE MINING CONTROL AND RECLAMATION ACT, 24-26 (1979) (state officials complained about overzealous action by OSM in enforcement).

140. *Compare* the procedures for state inspections, 30 U.S.C. § 1267 (Supp. III 1979), *with* those for federal inspections, *id.* § 1271. The provisions for prior notice to the person inspected, and for when and for what reasons inspection may take place indicates that Congress envisioned separate inspections.

141. *See, e.g.,* Council of S. Mountain v. Andrus, No. 79-1821 (D.D.C. 1979).

continuing to object to any federal presence in the coal fields.[142]

B. Permanent Program Regulations

OSM had less success in developing a permanent regulatory program that avoided the strains between the state-federal relationship and the performance standards. The permanent program regulations finally adopted on March 13, 1979, initially and most dramatically illustrate this conflict.[143] The task of coherent integration of the divergent congressional purposes continues.[144] An exhaustive analysis of the final permanent program regulations exceeds the scope of this article; however, brief attention to several issues illustrates that the conflict between the two goals arose from statutory language. Furthermore, the statutory language establishing the permanent program contained far more detail than the interim program and, therefore, did not allow for interpretive flexibility as a means for agency accommodation of this conflict. OSM created mechanisms to resolve the tensions in the federal-state relationship without explicit support in the statutory language.

1. The State-Federal Relationship.—SMCRA approached the issue of state primacy quite differently for the permanent program than it had for the interim program. State primacy under the interim program received scant attention in only a few phrases in section 502(h) of SMCRA.[145] State primacy, however, occupied a more important position in the permanent program. A number of congressional interests were at stake as the states moved toward primacy.

142. An interesting parallel situation is the development of the federal lands program under section 523 of SMCRA. 30 U.S.C. § 1273 (Supp. III 1979). As early as 1973 Congress recognized the unique administrative problems presented by checkerboard and intermingled federal and nonfederal lands in the western states. S. REP. NO. 402, *supra* note 91, at 20-21. Early proposals provided for a joint federal-state system of management, but withheld from the states the authority to fully regulate mining and reclamation activities on federal lands. The delegation of legal authority by one jurisdiction to the other would have established this system. Not until 1977, in response to correspondence from Secretary of the Interior Andrus, did the idea of a cooperative agreement emerge as the mechanism for achieving coordinated management. Hearings on S. 7 before the Subcom. on Public Lands and Resources of Sen. Comm. on Energy and Natural Resources, 95th Cong., 1st Sess. 7 (1977). Regardless of the mechanism chosen by Congress, at no point did it consider how to merge the implementation of this mechanism with the substantive and scheduling requirements of SMCRA established elsewhere. Again this difficult problem of integration would lead Governor Edward Herschler of Wyoming to comment "SMCRA looks to the states to take the lead in implementing a national program. . . . [T]he Federal Office of Surface Mining has jeopardized this fundamental failure of the Federal Act with its performance to date. 125 CONG. REC. S. 12361 (daily ed. Sept. 11, 1979).

143. 30 C.F.R. ch. VII (1981).

144. Substantial revisions to the regulatory requirements of the permanent program now exist in some stage of consideration. *See* 47 Fed. Reg. 1709 (1982), which lists numerous changes to be considered during calendar year 1982.

145. 30 U.S.C. § 1252(b) (Supp. III 1979).

These interests included rapid implementation of a full regulatory program, full environmental protection, and effective enforcement.

Section 503 of SMCRA[146] contains the fundamental requirements for state primacy. Section 503 imposes upon the states the burden of demonstrating the following capabilities of state law to the Department of the Interior: to set standards for coal operators as stringent as the federal performance standards;[147] to issue the same types of sanctions that OSM may issue under federal law to enforce compliance with the performance standards;[148] and to implement an effective permit system for coal operators that incorporates the performance standards.[149] Section 503, in combination with the legislative history,[150] led OSM to develop an approach that virtually required the states to reproduce the federal scheme for regulating coal mining before they could expect approval for primacy. OSM's decision led to very detailed regulations setting forth requirements for, *inter alia*, the content of state programs, schedules for decision processes, and criteria for approval or disapproval. This action markedly contrasted with the approach taken in the regulations defining state-federal relations during the interim program, and the states found the action highly unacceptable. Consequently, the litigation challenging the propriety of the definition of the state-federal relationship reached unprecedented proportions in the field of environmental law.[151]

Two issues addressed by the permanent program regulations illustrate the nature of the states' objection. The first concerned how closely the state program had to parallel the federal law and regulations. The permanent regulations promulgated by OSM required that, to be considered "in accordance with" the standards in SMCRA and thereby eligible for departmental approval for primacy, a state mining program be as stringent as the relevant minimum standards of SMCRA.[152] The states' vigorously argued both before the courts and the agency that this language had the practical effect of forcing the states to duplicate the federal program without regard to either local circumstances or the states' role as primary implementors of the permanent program. The courts rejected this contention[153]

146. *Id.* § 1253. Importantly, numerous other sections of SMCRA contain language that constrains the design of the state program.

147. 30 U.S.C. § 1253(a)(1) (Supp. III 1979).

148. *Id.* § 1253(a)(2).

149. *Id.* § 1253(a)(4).

150. *See supra* notes 55-110 and accompanying text.

151. *See In re* Permanent Surface Mining Regulation Litigation, 653 F.2d 514 (D.C. Cir. 1981).

152. 30 C.F.R. § 730 (1979).

153. *In re* Permanent Surface Mining Regulation Litigation, 653 F.2d 514 (D.C. Cir. 1981).

precisely because OSM's strict interpretation of SMCRA complied with the congressional intention that

> [a]n approved State program require[d] (1) a State law consistent with the Federal law and (2) State rules and regulations consistent with the Secretary's regulations. The Conference report retains the basic principle that the federal laws *and regulations* are minimum standards which may be exceeded by the states.[154]

Notwithstanding the judicial approval of the administrative interpretation of congressional intent, the rigorous standard of comparability continued to provoke the states and gave rise to further efforts by OSM to allow greater freedom for state departure from the precise requirements of SMCRA.

A second aspect of the permanent program regulations that the states considered as negating their appropriate role concerned the expeditious schedule by which Congress required the existence of a complete regulatory program, preferably administered by a state. SMCRA required that the full program be operative no later than June 3, 1980.[155] To allow for orderly procedures prior to that date, SMCRA required states to submit programs for approval no later than February 3, 1979.[156] Unfortunately, a series of events and circumstances delayed the permanent program regulations until March 13, 1979.[157] The obvious inability of the states to submit programs within the contemplated schedule and of the Secretary of the Department of the Interior to review the submissions led the agency to consider the extent to which it could issue regulations that varied from the statutes. The agency developed rationales for variations and at least moved the date for submittal of state programs to August 3, 1979.[158] The extraordinary time restrictions, accommodation however, caused several states to institute challenges in court once again. Upon the petition of Virginia and Illinois, the United States District Court for the District of Columbia enjoined the enforcement of the August 3rd deadline, while not ruling on the mandatory nature of the June 3, 1980 deadline.[159]

In the permanent program regulations, OSM attempted to achieve scrupulous adherence to the statute's mandates regarding both time schedules and design of state program. The statute's precision in both regards provided little opportunity for flexibility and negated the opportunity for state creativity in assuming primacy.

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154. H. REP. No. 218, 95th Cong., 1st Sess. 62 (1977), *reprinted in*, 1977 U.S. CODE CONG. & AD. NEWS 600.

155. 30 U.S.C. § 1254(a).

156. *Id.* § 1253(a).

157. For example, the requirement that consultation be carried out with the Council of Economic Advisors resulted in delay. 44 Fed. Reg. 14908 (1979).

158. 30 C.F.R. § 731.12(a) (1981).

159. *In re* Permanent Surface Mining Regulations Litigation, 617 F.2d 807 (D.C. Cir. 1980).

The states found this result highly unacceptable since it appeared to conflict with the proper role of the states as they understood it in the implementation of SMCRA.[160] Perhaps some states even considered the primacy process as one calculated to prevent states from submitting approvable programs and thereby allowing the federal government to assume primacy in administering the Act.[161] An examination of the content of the permanent program substantive regulations illustrates how the states could possibly have reached this perception.

2. The Substantive Standards.—The permanent program performance standards continued the pattern of the interim program. In an effort to articulate precisely the full requirements of SMCRA's regulatory performance goals, the regulations repeated and elaborated the detail of the interim regulations. Beyond the detail for performance standards, however, the regulations adopted new language covering bonding,[162] contents of applications for permits,[163] and procedures for approving permits.[164] The federal regulations had not addressed these topics during the interim program, but the Act seemed to clearly require them as part of the permanent program.[165]

As OSM considered the total impact of the rigorous requirements of the permanent program regulations it became apparent that the states would vigorously resist the overwhelming burden of mandating literal compliance with all of these regulations. Accordingly, the proposed regulations contained the so-called "state window"[166] by which the states could request and receive a variance from the methods specified in a regulation if the state met the relevant performance standard. A state could, under this proposal, adapt the primacy program it had submitted to the Department of the Interior to its own specific circumstances. If the state could demonstrate that the alternative method could still capably achieve the minimum national performance standards of SMCRA, the Department would not deny approval of the state program because of failure to utilize the precise method specified in the regulations. The final regulations adopted the "state window" concept.

Section 731.13,[167] containing the "state window" regulation, was an extraordinary regulatory development by OSM that provided

160. *See generally* COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFFICE, ISSUES SURROUNDING THE SURFACE MINING CONTROL AND RECLAMATION ACT, 4-22 (1979).
161. *Id.*
162. 30 C.F.R. §§ 800-09 (1981).
163. *Id.* §§ 770-85.
164. *Id.* §§ 786.95.
165. *See, e.g.,* 30 U.S.C. § 1257 (Supp. III 1979) (detailing the information required in an application for a permit).
166. 43 Fed. Reg. 41,810 (1978).
167. 30 C.F.R. § 731.13 (1981)

some relief to the states from the unremitting mandatory nature of the statutory language of SMCRA. Notably, the breadth of the "state window" concept established a procedure for state-created variances that could address virtually any of SMCRA's requirements. Moreover, and even more surprising in light of the agency's previously rigid adherence to the statute, the variance procedure found no explicit support in either the language of the statute, other than the very general provision of section 201(c)(9), or in the legislative history.[168] The "state window" concept originated, however, from the need of the agency to reconcile the exhaustive federal regulatory program anticipated by SMCRA with the equally strong states' expectation that they would primarily implement the legislative scheme. This accommodation of the states' expectation of primacy, which SMCRA recognized, resulted in the establishment of a procedure that could, unless vigorously policed, allow the destruction of the other primacy congressional goal—a nationally established minimum set of substantive requirements for the mining of coal.

2. Consequences.—State fear that the Department of the Interior would vigorously police the procedural requirements of the "state window" led the states to reject it as a solution to achieving and maintaining primacy. The states challenged the provision as too restrictive; however, the challenges failed.[169]

Exploration of the congressional reaction to OSM's failure to resolve satisfactorily the tension between state primacy and strong performance standards offers greater interest. In the summer of 1979, Congress, following oversight hearings,[170] became alarmed that events were frustrating its intention that the states have primacy in implementing SMCRA. In response, the Senate Committee on Energy and Natural Resources reported out Senate Bill 1403. The report proposed a change in the schedule for state program review, removed the requirement that state programs comply with federal regulations, and changed procedures in federal lands.[171] The committee report amended a bill[172] offered by Senator Henry Jackson

168. This section provides the following: "Assist the States in the development of State Programs for surface coal mining and reclamation operations which meet the requirements of the Act, and at the same time, reflect local requirements and local environmental and agricultural conditions." 30 U.S.C. § 1202(c)(9) (Supp. III 1979).

169. *In re* Permanent Surface Mining Regulation Litigation, 653 F.2d 514 (D.C. Cir. 1981).

170. *Implementation of the Surface Mining Control and Reclamation Act: Oversight Hearings before Subcomm. on Public Lands and Resources of the Sen. Comm. on Energy and Natural Resources,* 95th Cong., 2d Sess. (1978); *Implementation of the Surface Mining Control and Reclamation Act of 1977: Oversight Hearings before the Subcomm. on Energy and Env. of the House Comm. on Interior and Insular Affairs,* 96th Cong., 1st Sess. (1979).

171. S. REP. No. 271, 96th Cong., 1st Sess. (1979).

172. *Id.*

that would have only made a time schedule change to ameliorate the consequences of the delay in the issuance of the federal permanent regulations.[173]

In debating Senate Bill 1403, Congress both reviewed OSM's success in interpreting legislative intent regarding SMCRA and discussed the need for a significant change in congressional instruction to the Department of the Interior.

Proponents of Senate Bill 1403 argued that the Department of the Interior had distorted the will and intent of Congress in the implementation of SMCRA and had "massaged it to the point that you [could not] recognize it any more."[174] It was argued that Congress intended that each state would have the right to develop programs addressing the special circumstances of the state.[175]

The opponents of Senate Bill 1403 recognized that adoption of the "state-lead" concept of the amendment would destroy the national and uniform mining program envisioned under SMCRA.[176] In floor debate the opponents noted that a congressional intent to give the states complete freedom to develop their programs would have abandoned health, safety, and environmental goals and abrogated any need to pass SMCRA initially. The agency promulgated the federal regulations pursuant to and in support of the language of the Act and its legislative history, and not in distortion of the will of Congress.[177]

The irony is clear. In the summer of 1979 Congress debated a bill arising out of a perceived failure of OSM to follow congressional intent while the very debate indicates that Congress had not clearly resolved its own intent. The Senate enacted Senate Bill 1403, but the Bill never reached the floor of the House.[178] The inability of Congress to clarify its intent, however, did not lessen the burden on the agency to respond to continued tension between the several congressional purposes.

V. Conclusion

The foregoing analysis of SMCRA and its first two years of implementation by OSM demonstrates the fallacy of the argument favoring more, not less, detail in legislative delegations of authority to the executive branch as a means of controlling abuses of executive power. Although Congress struck a workable balance by giving primary regulatory responsibility to the states to implement federally

173. *Id.*
174. 125 CONG. REC. S 12,354 (daily ed. Sept. 11, 1979) (statement of Senator Ford).
175. 125 CONG. REC. S. 12,350-12,389 (daily ed. Sept. 11, 1979).
176. *Id.* at S. 12,350 (statement of Senator Jackson).
177. *Id.*
178. *Id.* at S. 12,371.

established programs, it excessively detailed environmental controls. OSM, in trying to implement the state-lead concept in concert with other congressional purposes, disturbed and restruck the congressional balance. Finally, the course of OSM's implementation of the interim and permanent programs illustrates that detail: (1) does not remove ambiguity and, consequently does not remove the opportunity for exercise of executive power; (2) adds emphasis and, therefore precludes the ability not to do certain things; and (3) circumscribes options so that legitimate interests cannot be accommodated. Congress, in mandating the executive branch to carry out two conflicting goals, gave that branch as difficult a delegation to implement as if it had told the executive to develop a regulatory program without any legislative guidance. The current claims of executive abuse in implementing SMCRA result inevitably from overly detailed legislation. A clearer articulation of congressional intent, not statutory amendments adding further detail, can provide the cure. Simple drafting can provide the means. The lesson of SMCRA should be that detail in delegation may mask congressional indecision rather than clarity of direction.